



## to Promote Safety & Security

# International Strait or Internal Waters?

*The navigational potential  
of the Northwest Passage.*

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Christopher Columbus left Spain in 1492 in search of a shorter route to and from the riches of Southeast Asia. Instead of finding that route, he found a new world. Yet Columbus's discovery did not end the search for a viable route between east and west; it still continues today. Modern-day explorers believe they have found that shorter route—the Northwest Passage, a sea route through the waters along the northern coast of North America. First navigated by famed Norwegian explorer Roald Amundsen in the early 20<sup>th</sup> century, the Northwest Passage was not seen as a viable navigational route for maritime shipping until the shrinking of the polar ice caps over the past half-century.

The passage has traditionally been almost completely ice-covered, presenting arduous, if not impossible, circumstances for navigation, which is why it took Amundsen three years to find his way through. As the Earth gradually warms and the Arctic ice packs recede, it becomes clearer that the Northwest Passage will eventually be ice-free, at least in summer months, sometime this century. The idea of an ice-free Northwest Passage has brought to the forefront a dispute between Canada and other nation states, including the United States and the European Union, over the legal status of the waterway. Canada claims the Northwest Passage as part of its internal waters and thus subject to its regulation, whereas the United States, the European Union, and several other

major maritime states contend that the Northwest Passage is an international strait, and thus subject only to international regulations.

The dispute is based on different interpretations of customary international law and the 1982 United Nations Convention on the Law of the Sea (UNCLOS). While the nations currently agree to disagree on this issue, a determination of the waterway's legal status must be made at some point. Both sides make legitimate claims and can point to interpretations of the law that support their claims, making it difficult to discern what the status of the Northwest Passage will be. Regardless of the ultimate determination, it will have a large impact on the



**The Coast Guard Cutter *Polar Star* leads a vessel through an ice-laden sea; such an escort may not be necessary in the Arctic in the near future. USCG photo by Rob Rothway.**

international maritime community and the U.S. Coast Guard as the world moves toward an ice-free Arctic.

The Northwest Passage has a sparse navigational history. Despite its discovery more than a century ago, there have only been approximately 100 surface transits of the Northwest Passage, and the majority of those transits have been by smaller ships and yachts. The first deep-draft vessels to navigate the waterway were United States Coast Guard Cutters *Storis*, *Spar*, and *Bramble* in 1957. The Coast Guard informed the Canadian government of its intention on this voyage—to collect hydrographic data in search of a deep-draft channel through the Arctic. The first international transit of the passage that was not sanctioned by the Canadian government was the 1969 transit of the SS *Manhattan*. This voyage tested the viability of the route for shipping oil from Alaska's North Slope. Although the *Manhattan's* voyage showed that the route was not commercially workable at the time, it opened the eyes of the world, and, more specifically, those of Canada, to the threat of an environmental disaster in the area.

### Not in My Backyard

Canada responded to that threat by passing the Arctic Waters Pollution Prevention Act, in which it claimed jurisdiction out to 100 miles from the coast for pollution prevention purposes and essentially claimed control over all shipping through the Northwest Passage. The United States protested Canada's unilateral assertion of sovereignty at the time, but did not physically challenge it until 1985, when United States Coast Guard Cutter *Polar Sea* transited the Northwest Passage without requesting Canadian permission.



Canada responded to this incursion by claiming straight baselines in the Arctic under the criteria contained in customary international law. This provided a stronger basis for its ability to regulate shipping in the region. The U.S. State Department again objected, and the ensuing discussions between the nations resulted in a 1988 agreement to continue disagreeing about whether the passage was an international strait or Canada's internal waterways.<sup>1</sup> Although neither side was willing to recognize the other's claim, the United States did

agree to notify Canada of any future transit by a U.S.

icebreaker within waters that Canada claimed as internal, based on the understanding that it would also engage in marine scientific research.

Since 1988, the U.S. and Canada have continued to disagree about the status of the Northwest Passage. However, as the pace of ice melting has increased, so has Canada's vigorous defense of its claim. James Overland, the division leader of the Coastal and Arctic Research Division at the National Oceanic and Atmospheric Administration's Pacific Marine Environmental Laboratory, predicts that the Arctic will contain 40 percent less sea ice in the summer of 2050 than currently exists.<sup>2</sup> Such predictions, along with indications that the strait is already becoming passable, as evidenced by the passage by a Russian icebreaker towing two floating dry docks in 1999, bode well for the future navigability of the Northwest Passage. Additionally, several smaller vessels have transited the passage in recent years; large cruise vessels capable of carrying more than 150 passengers and 100 crew have also transited through the passage with Canada's permission.

This may be only the beginning of the commercial traffic that the Northwest Passage will see, as the route cuts 3,000-4,000 miles from the transit between Europe and Asia, allowing for significant savings of both fuel and time. Knowing the potential benefits that international shippers stand to gain and fearing the environmental and security risks that would accompany a large increase in maritime traffic through the Northwest Passage, Canada has recently stepped up its efforts to assert the claim that the passage is part of its internal waters.

In 2007, Canadian Prime Minister Stephen Harper announced plans to build at least six armed icebreakers to patrol the Arctic, as well as to construct a warfare training center and deep-water port in the Arctic to enforce this claim. The Canadian military no longer refers to the waterway the Northwest Passage, but instead refers to it as the "Canadian Internal Waters."<sup>3</sup>

### Why Does the Legal Status of the Northwest Passage Matter?

The validation of Canada's claim that the Northwest Passage is its internal waters could have a large impact on its use for international navigation. Canada would be able to enact legislation to protect the waterway, regulate traffic, and could even prevent marine traffic from entering the passage if it chooses to do so. Canada has repeatedly stated that it does not wish to prevent traffic from using the waterway, but instead wants to be able to protect the fragile Arctic environment, ensure the



**There are multiple routes that could make up the Northwest Passage, but all depend upon the condition of the ice.**

country is secure, and promote other domestic interests. Even if Canada vows not to close the Northwest Passage to marine traffic, the additional regulations could greatly affect the amount of international shipping traffic that takes advantage of transiting the passage.

Such impact could greatly affect U.S. Coast Guard operations as the Northwest Passage becomes more navigable. An ice-free passage could change the present perception that using a northerly route is not feasible for oil tankers, and could provide an alternative to continued upkeep of the Alaska Pipeline. The addition of tanker traffic through the passage and north of Alaska would provide many challenges for the Coast Guard in Arctic waters within U.S. jurisdiction, including protecting the vessels from terrorist attack, ensuring the waterways are suitable for transit, and maintaining readiness to respond to an oil spill or environmental emergency. A successful claim by the Canadians that the Northwest Passage is part of their internal waters could also have a more direct effect on the U.S. Coast Guard—Coast Guard cutters could be subject to the same Canadian regulations as all other traffic wishing to transit. The cutters would also have to request Canadian permission to enter the Northwest Passage, as there would be no right of innocent passage or of transit passage through the waterway.<sup>4</sup>

If the Northwest Passage were found to be an international strait, there would be a right of transit passage through the waterway requiring that all vessels be allowed to transit without impediment. The Canadian government would then only be able to enforce international regulations. Unless the vessel was planning to

call on a Canadian port, Canada could not add any specific regulations to protect its national security, the surrounding areas, or other interests. However, there is a possibility that Canada would still be able to enact and enforce additional regulations for the prevention, reduction, and control of marine pollution from vessels. UNCLOS Article 234 gives coastal states the ability to enact such regulations “where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the environment could cause major harm to or irreversible disturbance of the ecological balance.”

Under this provision, Canada could enforce environmental regulations on vessels transiting through the passage, but military and government ships would not be directly subject to them. It seems that UNCLOS Article 234 would fit the Northwest Passage and the Arctic approaches to it. However, if the passage is navigable for international shipping on a large-scale basis it may no longer be ice-covered for a majority of the year. Such a condition could mean that Canada would only be able to enforce international regulations, as Article 234 would no longer apply.

The U.S. seeks that the Northwest Passage be recognized as an international strait with a right of transit passage; the success of this claim would have multiple effects on U.S. maritime interests. For example, U.S. Coast Guard cutters could freely transit the Northwest Passage without receiving the consent of or being subject to regulation by the Canadian government. Of course, they would have to comply with Canadian re-



quirements to conduct marine scientific research operations. Such a view of the passage would allow all vessels the same rights that the Coast Guard cutters would enjoy, which could greatly increase shipping traffic through the passage. Such an increase would create the need for an increased U.S. Coast Guard presence off the north coast of Alaska to respond to emergencies, safely regulate traffic, and protect the environment. Whether the passage will be recognized as Canada's internal waters or an international strait, and how that finding could come about, remains unclear for several reasons.

### **Canada Claims the Northwest Passage as Internal Waters**

Canada claims the Northwest Passage as its internal waters under Article 8 of the 1982 UNCLOS, which states "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." Over the past century, Canada has put forth at least three theories as to why these waters are internal: a sector claim, a historic basis, and straight baselines. The "sector" claim was first made in 1907 by Canadian Senator P. Poirier asserting "that Canada's Arctic claim should extend from the mainland of Canada up to the North Pole, bounded by sector lines—the 141<sup>st</sup> meridian of west longitude to the west and the 60<sup>th</sup> meridian of west longitude to the east—which would form an apex at the North Pole."<sup>5</sup> Although that claim is not regularly put forth today, it has never been abandoned by Canada. This claim is very weak, because it has never been recognized internationally and does not comport to any current international conventions or views of sovereignty, but Canada may use it as background for other claims.

Canada has also made a claim of historic title. This claim is based on the idea that since an 1880 deed transfer of the Arctic Islands from Great Britain to Canada, the waters of the Arctic Archipelago have been Canada's internal waters. Canada also claims to have established sovereignty over the waters (in addition to the lands) of the Arctic through historic, effective occupation and control. Such a claim is not unprecedented, but the manner in which Canada has enforced the claim leads to doubts as to its viability. This claim is much stronger than the sector claim, but it still relies on a historic view that may or may not be recognized, without any reliance on current international law.

The strongest and most frequent argument for Canadian sovereignty over the Northwest Passage is the establishment in the mid-1980s of straight baselines between mainland Canada and the islands of the Arc-

tic Archipelago. Straight baselines are authorized by UNCLOS Article 7 for use "in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." The convoluted coast of Norway is one example of an area where straight baselines have been authorized and internationally recognized.

On the other hand, the straight baselines drawn by Canada may not be valid because UNCLOS specifies "the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea area lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." The length of Canada's straight baselines in the Arctic have been the focus of much criticism, as some of the legs are in excess of 90 nautical miles long. Moreover, they seem to depart markedly from the general direction of the coast. Such baselines are not unprecedented, as Canada has other straight baselines of comparable length that are undisputed between Vancouver Island and the Queen Charlotte Islands, and Burma, Colombia, Vietnam, and several other states have drawn straight baselines that are much longer than those Canada has drawn in the Arctic.

However, many argue that such long baselines cannot possibly conform to the general direction of the coast, as was required by the International Court of Justice in the *Anglo-Norwegian Fisheries Case*, the seminal case regarding the drawing of straight baselines and the basis for the UNCLOS articles regarding straight baselines.<sup>6</sup> The maximum length of any baseline in that case was 44 nautical miles. Moreover, UNCLOS article 7 requires straight baselines not to depart from the "general direction of the coast." Several of Canada's baseline segments go off at sharp angles. Finally, the sea areas landward of the baseline must be "closely linked to the land domain."

### **Claims That the Northwest Passage is an International Strait**

In direct conflict with the Canadian claim, the United States and other maritime powers maintain that the Northwest Passage is an international strait, defined in Part III of UNCLOS as "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." There is a two-part test that must be applied to determine if a waterway is an international strait; the test consists of geographic and functional components. The geographic component is clear in that it requires that an in-

ternational strait must connect two parts of the high seas or exclusive economic zones.

The functional component is less clear. The test for the functional component is based on the *Corfu Channel Case* decided by the International Court of Justice (ICJ) in 1949.<sup>7</sup> The Corfu Channel is a small body of water between the Greek island of Corfu and the Albanian mainland, which United Kingdom vessels transited through without the permission of the Albanian government. Albania protested that the transit by the ships was an attack on Albanian sovereignty. The ICJ found that the strait was an international strait because it connected two parts of the high seas and was used for international navigation by over 2,800 vessels in less than two years. Like the Corfu Channel, the Northwest Passage fits the geographic requirements because it provides a navigational link between the Atlantic and Pacific Oceans.

It is less clear as to whether the Northwest Passage would be considered as having been used for international navigation, therefore meeting the functional test. The strait has been transited very few times, and most of those times have been with Canada's consent. Despite the transits of the *Manhattan* and the *Polar Sea*, it may be disputed whether the few known unsanctioned transits of the passage could establish it as an international strait. One argument in support of the transit history meeting the functional test is because of the location and nature of the waterway (ice-covered), the small number of transits should be sufficient. It is unknown how strong of an argument this is, and there is no way to know how much weight it would be given in determining the status of the waterway.

One other significant difference between the Corfu Channel and the Northwest Passage is that the Corfu Channel cuts between Greece and Albania, while the Northwest Passage cuts only between Canadian land masses. The ICJ relied heavily on the fact that the channel was made up of not just Albanian waters, and that Greece relied on it for vessel traffic to and from the port of Corfu. Not only is the Northwest Passage made up entirely of Canadian waters, but no nation, including the U.S., has any ports that require accessibility through the passage. However, if there was a move toward shipping oil from northern Alaska through the Northwest Passage, the U.S. may be able to make an argument that using the passage is necessary or significantly more convenient, and thus should be viewed as an international strait.

### **A Determination May Be Difficult to Reach**

There are many ways that a determination of the status of the Northwest Passage could come about. The international community could come together and sign an international agreement that would be recognized by the International Maritime Organization (IMO), but such an agreement is unlikely to occur because of the multitude of views and interests that would have to be represented. The United States and Canada could enter into a bilateral agreement regarding the status of the Northwest Passage and then that agreement could, over time, become recognized as customary international law. However, such an agreement is also unlikely because neither side is likely to fully capitulate to the other's viewpoint.

Another possible way for a determination to come about is that the two nations will continue to disagree until one decides to dispute the status in some type of international court or arbitral tribunal. It seems most likely that Canada would take the initiative to do this because the Canadian government is more engaged in the topic and it is Canada that views its sovereignty as being at risk. If Canada chooses not to bring the issue before a court, it would be left to try to enforce the claim by telling vessels not to transit and taking actions to prevent them from transiting.

No matter how the dispute is settled, the resolution will have a wide-ranging effect on international maritime law. There are several straits and waterways that have similar characteristics to the Northwest Passage, which could potentially become international straits or internal waters; Australia's Torres Strait, the Strait of Malacca, and Iran's claims regarding the Strait of Hormuz all may be affected by a determination (no matter what that determination is) as to the status of the Northwest Passage.

A determination of the status of the Northwest Passage could also begin the process of interpreting UNCLOS Article 234, including when it applies. If the Northwest Passage is found not to fall under the regulating authority of Article 234 because of its ice-free status and navigability during a portion of the year, it could be a precedent dangerous to the interests of Arctic countries. On the other hand, a decision that Article 234 does apply to the Northwest Passage, even though it is ice-free for up to half the year, would solidify the abilities of Arctic countries to enact environmental protections that could possibly stifle the economic and navigational interests of other nations, including the United States.

## What the Future Holds

As routine navigability of the fabled Northwest Passage nears, questions about the waterway's status will continue. The disagreement between Canada and the United States is not likely to be resolved on its own. Recent mock negotiations between experts from both nations (including former U.S. Ambassador to Canada Paul Cellucci and former Commander of the Canadian Forces Northern Area Colonel Pierre Leblanc) resulted in several recommendations, but the two sides could not resolve the ultimate question. Despite that failure, perhaps the best solution for both countries would be to follow the recommendations that did come out of those negotiations<sup>8</sup> and work together in enacting and enforcing a broad regulatory scheme to protect the Arctic, in turn protecting the environment and the security of both nations.

Each argument has some merit, but neither nation is certain enough that its claim will succeed to push the issue at this time. Questions still linger regarding whether the straight baselines drawn by Canada will meet the standards of the *Anglo-Norwegian Fisheries Case* and whether the transits of the passage will be sufficient to meet the standards set up in the *Corfu Channel Case*.

Whatever the ultimate determination, it will have a large impact on the international maritime community and the U.S. Coast Guard as the world moves toward an ice-free Arctic. A joint effort to protect the Arctic, promote safe and secure international navigation, and in turn protect the national security and other interests of both nations could be the best recourse in this situation.

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<sup>1</sup> Agreement Between the Government of Canada and the Government of the United States of America on Arctic Cooperation, Jan. 11, 1988, U.S.-Can.

<sup>2</sup> James E. Overland and Muyin Wang, "Future Regional Sea Ice Declines, Geophysical Research Letters," Vol. 34, L17705, Sept. 8, 2007.

<sup>3</sup> Nathan VanderKilpe, "Northwest Passage Gets Political Name Change," CanWest News Service, Apr. 9, 2006.

<sup>4</sup> United Nations Convention on the Law of the Sea.

<sup>5</sup> Donald McRae, "Arctic Sovereignty? What is at Stake? Behind the Headlines" (1/1/07), available at [http://findarticles.com/p/articles/mi\\_hb6544/is\\_200701/ai\\_n25917478?tag=content;col1](http://findarticles.com/p/articles/mi_hb6544/is_200701/ai_n25917478?tag=content;col1). Hearing Before the Canadian Senate Standing Committee on Fisheries and Oceans, 39<sup>th</sup> Parliament, May 6, 2008.

<sup>6</sup> Gayl S. Westerman, "Straight Baselines in International Law: A Call for Reconsideration," Pace University School of Law Faculty Publications 263, 1988.

<sup>7</sup> McRae (see endnote 5).

<sup>8</sup> The negotiations resulted in the following recommendations:

<sup>1</sup> "That the two countries collaborate in the development of parallel rules and standards and cooperative enforcement mechanisms with respect to notification and interdiction zones in the northern waters of Alaska and Canada;

<sup>2</sup> The implementation of the 2005 expansion of the NORAD agreement, which includes the sharing of all maritime surveillance in the area covered by that agreement, and that the two countries cooperate in the development of further surveillance capabilities;

<sup>3</sup> Building from the Arctic Waters Pollution Prevention Act, that the two countries develop common navigation, safety, and ship operation and construction standards;

<sup>4</sup> That the two countries cooperate on the establishment of shipping lanes, traffic management schemes, and oil spill response in the northern waters of Alaska and Canada;

<sup>5</sup> That the two countries cooperate with respect to immigration and search and rescue concerns related to cruise ships;

<sup>6</sup> That the two countries accelerate the acquisition of new icebreakers. The two countries should maximize burden sharing opportunities, following the models of the U.S.-Canada icebreaker agreement on the Great Lakes and the agreement on the resupply of Thule Air Base;

<sup>7</sup> That the two countries step up their efforts to develop safety infrastructure, including search and rescue, in support of increased shipping in the northern waters of Alaska and Canada;

<sup>8</sup> That the two countries make maximum use of their existing port state and flag state authority to promote safe, secure, and environmentally responsible shipping;

<sup>9</sup> That the two countries consider establishing a U.S.-Canada Arctic Navigation Commission to address their common interests in navigation, environmental protection, security, safety, and sustainable economic development. This Commission should include representation from indigenous groups directly affected by navigation. This Commission would follow the model of the International Joint Commission by acting as a recommendatory body. This Commission should operate within the framework of the already legislated bi-national research body, the Arctic Institute of North America."